



OFFICE OF THE POLICE COMMISSIONER
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March 26, 2014

(Signature)

Memorandum for: Deputy Commissioner, Trials

Re: **Sergeant Robert Borrelli**
Tax Registry No. 903466
Bronx Court Section
Disciplinary Case Nos. 2012-6660 & 2012-7865

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on July 19, July 29, August 9, August 15, and August 26, 2013, and was charged with the following:

DISCIPLINARY CASE NO. 2012-6660

1. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on-duty, on or about July 13, 2011 and in Queens County, was discourteous to New York City Police Officer Shawline Senior, in that said Sergeant stated to said Police Officer, in sum and substance, "Get your ass into the hallway!"

P.G. 203-09, Page 1, Paragraph 2

**PUBLIC CONTACT - GENERAL
GENERAL REGULATIONS**

2. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on-duty, on or about July 13, 2011, in Queens County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: Said Sergeant massaged the neck and shoulders of a female subordinate while in a Department facility.

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT-
PROHIBITED CONDUCT
GENERAL REGULATIONS**

3. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on-duty, on or about August 30, 2011, in Queens County, did fail and neglect to make complete entries in said Sergeant's Activity Log (PD 112-145), as required.

P.G. 212-08, Page 1, Paragraph 1-2

**ACTIVITY LOGS, COMMAND
OPERATIONS**

SERGEANT ROBERT BORRELLI

**DISCIPLINARY CASE NOS. 2012-6660 &
2012-7865**

DISCIPLINARY CASE NO. 2012-7865

1. Said Sergeant Robert Borrelli, assigned to Bronx Court Section, while off-duty, on or about and between November 22, 2011 and November 23, 2011, at various locations known to this Department, in New York State, did wrongfully interfere with a Department investigation, to wit: said Sergeant repeatedly contacted the complainant in an ongoing investigation which said Sergeant was not assigned to.

P.G. 203-10, Page 1, Paragraph 5

**PUBLIC CONTACT -
PROHIBITED CONDUCT
GENERAL REGULATIONS**

2. Said Sergeant Robert Borrelli, assigned to Bronx Court Section, while off-duty, on or about and between November 1, 2011 and April 1, 2012, at various locations known to this Department, in New York State, did wrongfully divulge or discuss official Department business, to wit: said Sergeant provided eight unredacted complaint reports to multiple news media agencies.

P.G. 203-10, Page 1, Paragraph 3

**PUBLIC CONTACT-
PROHIBITED CONDUCT
GENERAL REGULATIONS**

In a Memorandum dated January 6, 2014, Assistant Deputy Commissioner David S. Weisel found Sergeant Robert Borrelli Guilty of Specification No. 2 and Not Guilty of Specification Nos. 1 and 3, in Disciplinary Case No. 2012-6660, and Guilty of Specification Nos. 1 and 2, in Disciplinary Case No. 2012-7865. Having read the Memorandum and analyzed the facts of this matter, I approve the findings in part, disapprove the findings in part, and disapprove the penalty.

While I approve of the findings with respect to Specification Nos. 1 and 3, in Disciplinary Case No. 2012-6660, and Specification Nos. 1 and 2, in Disciplinary Case No. 2012-7865, I have determined that Sergeant Borrelli should be found Not Guilty of Specification No. 2 in Disciplinary Case No. 2012-6660. In consideration of the totality of his misconduct, Sergeant Borrelli's disciplinary penalty shall be reduced to the forfeiture of thirty (30) vacation days.



William J. Bratton
Police Commissioner



POLICE DEPARTMENT

January 6, 2014

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Robert Borrelli
Tax Registry No. 903466
Bronx Court Section
Disciplinary Case Nos. 2012-6660 & 2012-7865

The above-named member of the Department appeared before the Court on July 19, July 29, August 9, August 15, and August 26, 2013, charged with the following:

Disciplinary Case No. 2012-6660

1. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on-duty, on or about July 13, 2011, in Queens County, was discourteous to New York City Police Officer Shawline Senior, in that said Sergeant stated to said Police Officer, in sum and substance, "Get your ass into the hallway!"

P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT- GENERAL, GENERAL REGULATIONS

2. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on duty, on or about July 13, 2011, in Queens County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Sergeant massaged the neck and shoulders of a female subordinate while in a Department facility.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT - PROHIBITED CONDUCT GENERAL REGULATIONS

3. Said Sergeant Robert Borrelli, assigned to the 100th Precinct, while on-duty, on or about August 30, 2011, in Queens County, while on duty, did fail and neglect to make complete entries in said Sergeant's Activity Log (PD 112-145), as required.

P.G. 212-08, Page 1, Paragraphs 1-2 – ACTIVITY LOGS, COMMAND OPERATIONS

Disciplinary Case No. 2012-7865

1. Said Sergeant Robert Borrelli, assigned to Bronx Court Section, while off-duty, on or about and between November 22, 2011 and November 23, 2011, at various locations known to this Department, in New York State, did wrongfully interfere with a Department investigation, to wit: said Sergeant repeatedly contacted the complainant in an ongoing investigation which said Sergeant was not assigned to.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT- PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Sergeant Robert Borrelli, assigned to Bronx Court Section, while off-duty, on or about and between November 1, 2011 and April 1, 2012, at various locations known to this Department, in New York State, did wrongfully divulge or discuss official Department business, to wit: said Sergeant provided eight unredacted complaint reports to multiple news media agencies.

P.G. 203-10, Page 1, Paragraph 3 – PUBLIC CONTACT- PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Javier Seymore, Esq., Department Advocate's Office. Respondent was represented by Richard H.B. Murray, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case No. 2012-6660, Respondent is found Guilty of Specification No. 2 and Not Guilty of Specification Nos. 1 and 3. In Case No. 2012-7865, he is found Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Police Officer Dina Zeoli, Police Officer Shawline Senior and Sergeant Kevin Mosiurchak as witnesses.

Police Officer Dina Zeoli

Zeoli was assigned to the 100 Precinct of the New York City Police Department (NYPD) in the Rockaways. She was covering the telephone switchboard (TS) desk there when she started her tour at 0705 hours on July 13, 2011. She actually was assigned as the assistant integrity control officer. Respondent and Police Officer Aleksander Vygon, who was assigned to the 100 Precinct for the summer beach detail, were there as well.

Zeoli had known Respondent for nearly her entire career, and they engaged in typical casual conversation. Respondent stepped behind her and asked how her neck was feeling. He knew that she had suffered a neck injury several months earlier in a car accident. When Zeoli told Respondent that she still was experiencing neck pain, he put his hands on her shoulders and started to rub her neck. This lasted for approximately two minutes. Although Zeoli did not ask Respondent to rub her neck or give him permission to touch her, she did not feel uncomfortable.

As Respondent was rubbing Zeoli's neck, the door behind them opened. Respondent stopped rubbing her neck, and Zeoli heard people talking loudly. She turned around to see Police Officer Shawline Senior with her children. Senior worked in the Juvenile Robbery Intervention Program (JRIP), which was located in the 100 Precinct station house but was not part of the command proper.

Zeoli testified that Senior was “speak[ing] loudly” at Vygon, saying, “What did you do that for?” Respondent asked Senior if there was a problem, but Senior walked away, while saying, “He shut the door on my kids.” Respondent instructed Senior, “Come over here.” Senior said, “No” and continued to walk away. Respondent walked upstairs.

On cross examination, Zeoli confirmed that she had a good collegial working relationship with Respondent. She respected his work and found him to be a fair supervisor and person of integrity. In fact, she considered him a friend. She had absolutely no objection to him rubbing or squeezing her neck. She never complained about it to the Office of Equal Employment Opportunity or anybody else.

Zeoli had known Senior for seven years and they had a good relationship too. Senior often spoke loudly, but that day she was upset. Senior yelled at Vygon, “What the hell is wrong with you? You almost hit my kids with the door.” When Respondent asked Senior what happened, she told Respondent, “I wasn’t talking to you,” and then walked away. Respondent told her in a commanding voice more than once, “Come back here,” but Senior continued walking toward the stairs to her office. Respondent followed Senior upstairs.

On re-direct examination, Zeoli testified that Respondent was not her direct supervisor because she did administrative work. Respondent usually was assigned as the patrol supervisor. Zeoli conceded that based on her training and experience it was not appropriate for a supervisor to massage a subordinate.

Upon questioning by the Court, Zeoli confirmed that she might have been on limited duty at the time of the incident. She worked in administrative positions before the accident, however.

Police Officer Shawline Senior

Senior was assigned to Patrol Borough Queens South's JRIP unit in a recurring temporary assignment from the 100 Precinct. She was assigned to the 100 Precinct itself from 2002 until 2007 and still worked out of that command's station house. The JRIP office was on the second floor.

On July 13, 2011, Senior worked a 0730x1605 tour. She asserted that she arrived on time. She admitted, however, that she brought her two 11-year-old twin sons with her to work that day.

As Senior and her sons entered the command, "an officer or an individual" whom she did not know, Vygon, was not looking behind him and let the door close on one of her sons. She informed Vygon that he almost hit her son with the door, but he did not respond. Inside the station house, she saw Respondent massaging Zeoli's shoulders at the TS desk. Respondent had one hand on each shoulder.

Senior told Zeoli, "Oh, the guy almost hit my son with the door," but Respondent responded, "He don't know who you are." Senior continued to walk past the TS desk to go upstairs. Respondent yelled again, "He don't know who you are." Senior opened the stairwell door and asked, "What are you taking about? What do you mean he don't know who I am?"

Senior walked upstairs to her office. Respondent followed and told her to "get [her] ass into the hallway." Senior's sons and one other officer were in the room at the time. Senior informed Respondent that she had not signed in yet. Respondent told her that he was giving her a lawful order and exited the room.

Senior was "kind of shaken up" at that point. She signed in, which she claimed took two or three minutes, before going outside to the hallway. She did not see Respondent, so she went

to the domestic violence office to see if he was there. She then saw Respondent walking with the administrative lieutenant. Respondent started yelling at Senior and saying that she should be sent home, that he was going to place her on modified assignment, and that she was not authorized to use the side door.

Senior was the subject of an official Department interview that day. She was neither modified nor received any discipline for her interaction with Respondent. At no point during the interaction did she curse or raise her voice at Respondent.

Senior never worked directly underneath Respondent, and she asserted that she never before had any type of encounter with him. She often used the side door of the command and never had been instructed to stop.

On cross examination, Senior admitted that she received a command discipline (CD) for her conduct during the incident, but it was for arriving to work late. She claimed at trial that she was not late but stated in her official interview that it took her “five to something minutes” to sign in. She indicated this was the discrepancy that led investigators to conclude she was late.

Senior claimed that she was permitted to bring her children to work with her.

Senior considered Zeoli to be both a co-worker and a friend. They socialized with each other every now and then.

As Senior entered the side door of the command, she told Vygon in passing, “You almost hit my son with the door.” Her voice was not raised. She neither threatened to slap Vygon nor told anybody that she should have slapped him. She walked past the TS desk toward the stairwell. There were a few officers in the area at the time.

Respondent was talking in a loud, angry voice when he told Senior that Vygon did not know who she was. This upset Senior. She denied yelling, but admitted that her voice was a

"little bit higher" than normal when she asked Respondent what he was talking about. She otherwise ignored Respondent and proceeded upstairs. She had no further communication with Respondent until he entered her office two or three minutes later. When Respondent told Senior that he was going to place her on modified assignment, she told him, "Do what you have to do." She admitted that she was a little upset but again denied raising her voice.

On re-direct examination, Senior testified that her children were going to be in work with her that day for just 10 or 15 minutes before they got picked up by their camp bus. She was not the only member of the service to bring her children to the command.

Sergeant Kevin Mosiurchak

Mosiurchak had been assigned to the Patrol Borough Queens South Investigations Unit (QSIU) for seven and a half years. He was assigned to investigate several allegations of misconduct involving Respondent. One was the incident at the 100 Precinct station house in July 2011. The initial interview was of Senior. During that official Department interview, it came out that Respondent had been massaging Zeoli in the lobby area of the station house. This stood out to Mosiurchak because it was inappropriate for a supervisor to massage a subordinate at work. Zeoli confirmed to Mosiurchak that the massage took place.

During the course of his investigation, Mosiurchak learned that Respondent participated in a car stop on August 30, 2011, but did not document it in his Activity Log (see Department's Exhibit [DX] 1, Respondent's Activity Log). According to Mosiurchak, a sergeant was required to make an Activity Log entry when he was in the police vehicle during a car stop.

During an official Department interview, Respondent admitted that he provided copies of several complaint reports, or '61's, to a newspaper. A subsequent Internet search tied

Respondent's name to that newspaper and a second newspaper. The search also revealed that Respondent had provided a taped interview to a local television news channel. In the news interview, Respondent discussed being targeted and labeled a whistleblower. He was identified as a New York City Police sergeant in the interview, though he was wearing regular clothes. Mosiurchak testified that members of the service were not allowed to give interviews to the public regarding what goes on in the Department without permission.

One of the complaint reports that Respondent gave to the newspaper was a complaint of criminal mischief that had been filed by Person A. The 100 Precinct Detective Squad (PDS) was investigating the case. At his official Department interview, Respondent admitted that even though he had no official role in the case, he contacted Person A by telephone. “[T]o [Mosiurchak’s] knowledge,” Person A did not proceed with the case because Respondent’s contacts made her uncomfortable.

On cross examination, Mosiurchak confirmed that he proceeded to the 100 Precinct station house on July 13, 2011, to investigate Senior’s dispute with Vygon, and allegations of courtesy and insubordination against her. There was a possibility that she would be suspended, but interviews had to be performed first. Zeoli subsequently told investigators that she had no objection to Respondent massaging her neck and did not wish to make any sort of complaint about it.

The August 2011 car stop under investigation involved the stop of a member of the New York City Fire Department (FDNY). The whole matter was uncovered as the result of a different investigation, also involving Respondent’s interaction with the FDNY, on or before April 9, 2011. Mosiurchak indicated that an FDNY member was interviewed concerning the April incident. That member stated that Respondent had made a car stop of a firefighter in

August. In fact, during the August incident, it was Respondent's driver that issued the summons. There was nothing improper about the summons itself.

Respondent forthrightly admitted in his official Department interview that he was the subject of a television news interview and had released Department documents to the media. He indicated that he had been cooperating with the Quality Assurance Division (QAD) with respect to the downgrading or misclassification of crimes within the 100 Precinct.

As part of his investigation, Mosiurchak subpoenaed the relevant phone records of Respondent and Person A. The only calls between them were two calls from Respondent's home phone to Person A's place of employment. Both took place on November 22, 2011, one at 1006 hours and the other at 1725 hours (see RX A, Respondent's phone records for Nov. 18-25, 2011).

RX B was the computer-generated complaint report for Person A's complaint of criminal mischief on November 18, 2011. The narrative section of the report read that Person A gave the perpetrator, her boyfriend or ex-boyfriend, keys to her apartment. The '61' also stated that the perpetrator broke Person A's television stand and items on the wall.

Mosiurchak noted that a comparison of RX B to the scratch copy prepared by the officer at the scene indicated Person A's phone number was added to the report at a later time. It was handwritten onto RX B only after RX B had been printed out. Mosiurchak did not know who wrote the number on the report.

RX C were complaint follow up informational reports, or DD-5s, relating to Person A's case. In one of the reports, dated November 24, 2011, the assigned investigator noted that on the previous day Sergeant Bruce Strang, the 100 Precinct crime analysis sergeant, re-classified the case from criminal mischief to burglary. The re-classification was based on Respondent learning

from Person A that the perpetrator removed two televisions from her apartment (see RX D, DD-5 of Strang documenting re-classification).

According to the RX C reports, the first time Person A had contact with a member of the 100 PDS was November 26, 2011. Person A indicated that the perpetrator was her estranged boyfriend, that he broke several items in her apartment, and that he removed two televisions that he had purchased. She also stated in the interview that she had been contacted by Respondent four or five times, both at work and on her cell phone. She also was stopped at a bus stop by a group of plainclothes officers, all of whom were asking her about the incident. The investigator indicated that Person A was "clearly upset" by having to repeat her story so many times and "that her personal business is being aired in a public man[ne]r."

RX E was an email that Person A sent to the assigned investigator on November 27, 2011. She stated that she reached an arrangement with her boyfriend and did not want him arrested. Person A continued, "I just want everything to be done with the police reports are all wrong I figured of take matters into my own hands and I'm getting everything back on my own it's easier that way so please just drop everything ..thank you."

RX F was a newspaper article, dated March 25, 2012. The article was a rebuttal of Respondent's downgrading claims, which he had publicized previously. The article quoted named and anonymous Department sources. The article mentioned that Respondent was transferred to the Bronx Court Section (BXCS) earlier that month. Respondent was quoted in the article as saying his transfer was retaliatory. The article went on to read, however, that Department sources claimed "the transfer was because the cop had a long disciplinary history... . Authorities said Borrelli's new assignment . . . was the result of complaints against him and a history of clashing with others. . . . They pointed to an incident in which he berated his

commanding officer [CO], another in which he interfered with a burglary investigation, and a third in which he ticketed a firefighter who was handing out radios during Hurricane Irene.”

Mosiurchak did not know who provided the information for the article. He did not know of any prior disciplinary incidents involving Respondent clashing with others or berating his CO.

On re-direct examination, Mosiurchak confirmed that a member of the service should not call the complainant in a case to which he was not assigned.

Mosiurchak stated that Department members were not allowed to speak to the media without permission from the Department. Respondent’s television interview aired on the station’s 11 o’clock late news. In total, Respondent provided eight unredacted complaint reports to the media.

On re-cross examination, Mosiurchak conceded that Patrol Guide § 212-08, which covered Activity Logs, did not state specifically that a sergeant was required to document a car stop by a subordinate. Mosiurchak was unaware of any other case from his time in QSIU in which a sergeant was charged with failing to make an Activity Log entry for a summons issued by a subordinate.

Upon questioning by the Court, Mosiurchak testified that Respondent’s TV interview aired on April 1, 2012.

The April 2011 incident reported by an FDNY member was a verbal dispute between Respondent and the FDNY’s chief of personnel. There was a fire to which members of the FDNY and NYPD responded. The FDNY chief had his son with him. The son was 11 years old but was a little person, very short for his age. The altercation began because Respondent believed that the son was too close to the fire. The chief of personnel related the incident to the battalion chief (BC) “of that particular area in the Rockaways.” Almost all of the Rockaway

peninsula was within the confines of the 100 Precinct. When Mosiurchak interviewed the BC, “it was brought to my attention about the another fireman who got pulled over on a particular date” in August 2011.

Senior received a CD for signing in at a time before she actually got to work on July 13, 2011. There was not enough evidence, based on the interviews conducted, to prove that Senior was discourteous.

Respondent’s Case

Respondent called Police Officer Aleksander Vygon and Lieutenant Joseph Napolitano as witnesses. Respondent also testified on his own behalf.

Police Officer Aleksander Vygon

Vygon, a five-year member of the Department, was assigned from 2009 to 2011 to the Patrol Borough Brooklyn North Impact unit. On July 13, 2011, however, he was assigned to the summer beach detail out of the 100 Precinct. He worked a midnight tour on that date and signed out at 0750 hours.

Vygon was leaving through the side door of the command when he encountered Senior. She became upset because Vygon unintentionally let the door close in front of her children. Senior told him in a loud and angry tone something along the lines of, “You slammed the door on my babies, what’s wrong with you.” Senior walked past Vygon toward the stairwell and continued to say some other things, but Vygon did not remember what she said. Vygon was not even certain if Senior was talking to him at that point or if she was just saying things in anger.

Respondent told Senior to relax and asked her why she was yelling. Vygon did not recall how Senior responded. She went upstairs. Afterwards, in the '124 Room,' Respondent told Vygon, "This is not right, she shouldn't talk to you this way." Respondent then followed Senior upstairs.

On cross examination, Vygon denied seeing Respondent giving a female officer a massage as he was walking out of the station house.

On re-direct examination, Vygon confirmed that he heard Senior state, "I should slap him."

Lieutenant Joseph Napolitano

Napolitano, a 12-year member of the Department, had been assigned to QAD since March 2010. He first contacted Respondent in May 2011. Respondent had alleged to IAB that Deputy Inspector Thomas Barrett, the CO of the 100 Precinct, was misreporting crime statistics by "fudging" the numbers of those complaints. In one specific case, Barrett allegedly disallowed a complaint report to be entered into the Omniform system. Respondent alleged that there was "a fireman on the scene of a particular incident," and that a burglary was committed but covered up. This particular matter was referred back to IAB.

Between May 2011 and February 2012, Respondent reported to Napolitano 11 instances that he believed were indicative of misreporting. Respondent provided Napolitano with '61's or index numbers thereof for cases that he felt were classified improperly. Napolitano found that three of the reports in fact had been misclassified.

One of the complaints that Respondent brought to Napolitano's attention was Person A's case. Respondent believed that the case was misclassified as criminal mischief and should have

been classified as a burglary. Respondent informed Napolitano of case information that he obtained from speaking with Person A. He stated that Person A told him she had not given her boyfriend keys to the residence or permission to enter. Two flat-screen TVs were removed. Respondent played for Napolitano a recording he made of his conversation with Person A. Napolitano testified that Person A's complaint subsequently was reclassified by Strang as a burglary. Napolitano interviewed Person A himself and agreed with Strang's conclusion.

At some point, Napolitano testified, Respondent called him and said that he had been transferred to BXCS. He told Napolitano that he believed his transfer was in retaliation for cooperating with IAB and QAD. Napolitano informed his supervisor of this.

On cross examination, Napolitano testified that the citywide error rate in classification of complaints was between 1.5 and 1.8%. It was 27.3% for the complaints Respondent brought to him, but the sample size was too small for that statistic to be meaningful.

Napolitano did not find that any misconduct had been committed in the misclassifications of the three complaints. Misclassification could occur for reasons like the reporting officer lacking information, unintentional omission by the officer, and the complainant giving inaccurate information.

Napolitano confirmed that Respondent had no official involvement in the majority of the complaint reports he brought to QAD. Napolitano did not know how Respondent obtained them.

Napolitano advised Respondent that in the future he should not contact complainants; QAD would do it. Napolitano told Respondent that he would need more information, but he did not ask Respondent to get any information for him. Respondent was not assigned to the Person A matter.

On re-direct examination, Napolitano did not recall if the three misclassified reports included Person A's case. He confirmed that there had been cases of misclassification due to intentional omission of information. QAD considered that to be misconduct, but this kind of wrongdoing was not present in any of the 11 reports.

Napolitano confirmed that QAD encouraged members to come forward with suspicions of misclassification. Respondent did nothing wrong in reporting. When Respondent played the recording of the telephone conversation with Person A, Napolitano did not report Respondent to IAB.

Upon questioning by the Court, Napolitano testified that it was after Respondent played the recording of the conversation with Person A that he advised Respondent not to speak with Person A directly.

Person A's case was re classified as a burglary because her boyfriend entered the apartment unlawfully and removed items from inside. It had not always been clear during the pendency of her complaint whether she had given the boyfriend a key to the apartment. She might have given him permission to enter the apartment earlier in their relationship but then they broke up. Yet he in fact had a key to the place. Thus, the original classification of criminal mischief could have been based on a combination of Person A omitting information and the responding officer misinterpreting information.

On re-direct examination, Napolitano confirmed that he was unaware of any specific Patrol Guide section that prohibited Respondent from speaking with a complainant and providing information to QAD. Napolitano did not perceive it to be misconduct for Respondent to speak with Person A.

Respondent

Respondent had been a member of the Department for 20 years. He was promoted to sergeant in May 2002 and assigned to the 100 Precinct. He had served in several special assignments, including the beach detail, youth sergeant and conditions sergeant.

Barrett was Respondent's CO. Barrett would call Respondent into his office whenever there was a '61' for an index, or "seven major," crime, and try to persuade Respondent to change classifications. Respondent was unwilling to make changes and would explain to Barrett the Penal Law basis for his classification choices. At some point, Barrett stopped dealing with Respondent and on several occasions had the desk officer make classification changes without Respondent's knowledge. Although Respondent had been assigned as conditions sergeant for three years, sometime in 2008, several months into Barrett's tenure, he was placed back on patrol. Still, he mostly worked day tours.

On May 6, 2011, however, Respondent was transferred to the midnight tour. That was contemporaneous with when he first was in contact with QAD. Respondent made an allegation to IAB that Barrett willfully downgraded a burglary complaint. Respondent was the supervisor that responded to the scene of the burglary. It was the theft of a car from a private tow pound by a firefighter whose car got towed from a private parking lot. After the crime occurred, Barrett asked Respondent about it. "[R]umor had it" that Barrett contacted a BC who also was his close friend. Barrett told the chief "to go make this correct, go straighten this out. . . to go there and make good on the burglary." If that happened, Barrett "would make it go away." Respondent spoke to the complainant. The complainant said that the suspect came to the pound and apologized. He paid twice the tow fee and gave the complainant a couple of FDNY shirts.

The crime analysis sergeant subsequently changed the classification to grand larceny auto. But the case ultimately was closed with clearance, with the DD-5 asserting that because the suspect retrieved his own vehicle, it could not be a larceny. The DD 5 did not mention that there was surveillance video of the suspect breaking into the pound.

Respondent testified that IAB referred the complaint to QAD, saying that it was not corruption. Respondent cooperated with QAD and gave them copies of complaint reports that he believed had been misclassified. He received encouragement from Napolitano to assist QAD in giving them information regarding the downgrading of crimes.

On July 13, 2011, Respondent worked a midnight tour as the patrol supervisor. Around 0755 or 0800 hours, Respondent indicated, he massaged Zeoli's neck or shoulders. Respondent was by the TS desk with two or three other members of the service when he heard Senior repeatedly scream at Vygon, "I should slap you; I can't believe you slammed the door on my babies' faces; what's wrong with you?" Respondent tried to calm Senior down, but she just continued screaming at Vygon. Senior then walked toward the stairwell with her children, stopping momentarily in the middle of the room to yell again at Vygon.

Respondent told Senior, "[T]hat's enough, stop it. He doesn't know you." He instructed Senior to stand by. They were standing approximately 15 feet apart from each other. Respondent did not recall if Senior acknowledged his order in any way. She continued to walk away.

Respondent followed Senior upstairs and told her that they needed to speak about what had occurred downstairs. He told Senior to step outside of the JRIP office. She replied that she had not yet signed in. He repeated his directive and she repeated her answer.

Respondent was stunned by Senior's conduct. He loudly told her, "As your immediate supervisor, I am ordering you into the hallway to talk about what just transpired downstairs." It was after Senior again repeated her answer that Respondent told her, "Get your ass in the hallway now." Senior's response became muted but she still refused to step into the hallway.

Respondent went to the administrative lieutenant and told him about Senior's failure to obey a lawful order. Respondent told the lieutenant that he wanted to have Senior suspended. At that point, Senior approached and told the lieutenant, "Do what you gotta do."

The lieutenant agreed with Respondent but wanted to confer with the CO, Deputy Inspector Scott Olexa, who had succeeded Barrett. Respondent had similar experiences concerning crime classification with Olexa. Retaliation continued under Olexa's supervision.

When Olexa arrived at the command on the day of the incident, he summoned QSIU to conduct official Department interviews. Respondent noted at trial that Olexa was the former CO of QSIU. Nevertheless, at no point during his interview that day was Respondent asked about his interaction with Zeoli.

The first time that Respondent was questioned about alleged misconduct concerning Zeoli was at a re-interview on September 13, 2011. Respondent told investigators that he felt he was being retaliated against by Olexa. A notification was made to IAB with the cooperation of QSIU. He subsequently received a letter from IAB informing him that there was sufficient evidence to substantiate the allegation partially (see RX H, letter, dated July 27, 2012).

Respondent was assigned as patrol supervisor on August 30, 2011. His driver, Police Officer Randolph Rodriguez, needed activity for the month and wanted to write summonses. At one point that day, Rodriguez observed a vehicle making an illegal left turn. Rodriguez pulled the vehicle over. Rodriguez actually warned and admonished the driver for the left turn, but

issued a summons for an expired insurance card. He instructed the driver that he could have the summons voided by mailing in proof of current insurance.

At the time, Respondent possessed approximately nine years of supervisory patrol experience. As a general rule, he did not make Activity Log entries when subordinates conducted traffic stops or issued parking summonses. According to Respondent, no sergeant routinely documented these things. Only the police officers themselves were required to do so.

Respondent admitted that he was not involved in the handling of the initial complaint made by Person A on November 18, 2011. Nor did he have any investigative responsibility with respect to the case. But the matter was brought to his attention by officers at the scene who felt that she "was wronged by not taking a proper complaint report for the crime classification." The officers admitted to Respondent that they omitted on the '61' that two televisions and a set of keys had been removed from the location. The officers approached Respondent because they knew that he was cooperating with QAD and IAB on downgrading in the precinct.

Respondent told Napolitano that Person A's case was classified as criminal mischief but that she was coached to leave certain items off of the complaint report. Napolitano cautioned that QAD usually did not contact complainants in domestic violence cases. Respondent asked Napolitano if he could call Person A himself. Napolitano replied that he could not stop Respondent from making the call.

There were no telephone numbers on the '61,' but Respondent knew that Person A worked at a certain restaurant frequented by police officers. On November 22, 2011, he called the restaurant early in the day and was informed that Person A did not work until later. He called back that evening and spoke with Person A. Person A confirmed that her boyfriend was not authorized to enter her apartment, that a set of keys was removed without her knowledge, and

that two flat-screen TVs were removed. None of this information was recorded on the original complaint report. Respondent described Person A as very cooperative. She told him that nobody had reached out to her yet regarding the incident, which was four days earlier, so she was happy to hear from him (see RX G & G1, audio recording & transcript of Respondent Person A conversation).

The next day, Respondent called Napolitano and played for him the recording of the call. At that point, Napolitano instructed Respondent to stop calling complainants and conducting interviews, telling Respondent that he did not think it was a good idea and QAD should handle it. Respondent gave Napolitano a cell phone number that Person A had given him the previous day. Respondent had no further contact with Person A in reference to the matter. He did not know who handwrote Person A's number onto the '61.'

Respondent admitted that between November 1, 2011 and April 1, 2012, he divulged and discussed official Department business, in that he divulged eight unredacted complaint reports to media sources. He did so because he believed that IAB and QAD were stonewalling the investigation, that they "were not really trying to determine the truth and all the allegations that I was giving to the Department." Respondent asserted that when he first reported the Barrett matter, IAB "never asked me any investigatory questions; they didn't ask me the location; they didn't ask me how I was involved." Although IAB gave Respondent a log number, they "didn't really delve into the situation." When Respondent followed up, the assigned investigator did not remember him and Respondent had to refresh his memory. The investigator would not give him details about the progress of the investigation. IAB repeated this answer several times when he called back. While an IAB lieutenant eventually informed Respondent that the matter had been referred to QAD, Napolitano later told him that it ultimately was returned to IAB.

Respondent also spoke with the United States Attorney's Office for the Southern District of New York and the Queens District Attorney's Office about the matter. Personnel at both of those offices told Respondent that they would call the Chief of IAB's office on his behalf.

Respondent asserted that he "was consistently asked for copies of my memo book by the integrity control officer. They would put me under a microscope for all jobs that I responded to and actions that I took to see whether I did some kind of improper police procedure."

Respondent was refused overtime, something that was supposed to be distributed equally among supervisors. He requested two days off several months in advance but Barrett denied them. He requested a chart day in lieu of going sick, but it was denied. He was told that he needed to go sick or else come in to work. He was scrutinized about whether he placed himself in the interrupted patrol log. "Pretty much anything that I was involved with was scrutinized, was placed under a microscope." Respondent believed that this was retaliatory in nature.

Respondent also believed that Barrett assigning him to the midnight tour was an act of retaliation. Up until that point, Respondent had worked day tours for the bulk of his career and Barrett knew that Respondent, the command's senior sergeant, preferred them. When Respondent complained, Barrett called Respondent a "thorn in his side" and told him that he should have transferred him to midnights a long time ago.

At the end of February or beginning of March in 2012, Respondent was transferred to BXCS. Although he conceded that he had suffered a line-of-duty injury that month, he believed the transfer was another example of retaliation. He was told that he was being transferred for cause, but was not given a specific reason. He had not yet been served with Department charges. Because he lived on Long Island, the transfer made his daily commute to work significantly longer and more expensive due to the toll. He also complained that he lost his night differential

because he was returned to day tours. In May 2012, Respondent was placed on Level II Monitoring but was not given a reason.

Ultimately, Respondent took the matter to the media because he did not think downgrading crime was fair to the public “and to the complainants and the taxpayers who pay their money to get police service.”

On March 24, 2012, a reporter from a different newspaper than Respondent gave the ‘61’s contacted him. Respondent spoke to the reporter, but when she asked for copies of documents, he refused. Another reporter came to his house that day and Respondent again refused to turn over documents. The next day, the newspaper published the RX F article. Respondent contended that the article was mistaken when it claimed that Respondent had “a long disciplinary history” because he only had appeared in the Trial Room once before for criminal association. What was more, the approval of the guilty finding was annulled, on the merits, on a proceeding pursuant to Article 78 of the Civil Practice Law and Rules. Respondent denied that he had “a history of clashing with others.” He maintained that he never was officially interviewed for courtesy toward his CO. Respondent also claimed that he did not give a ticket to a firefighter handing out radios during the hurricane.¹

RX I consisted of three Department memoranda, dated September 11, 2008, October 3, 2008, and November 19, 2010, documenting Respondent’s receipt of Commander’s Day Awards in acknowledgement of superior performance or an exceptional act.

On cross examination, Respondent confirmed that he massaged Zeoli’s neck while she was sitting at the TS desk. He was in uniform at the time and had not yet signed out. There was nothing sexual about the massage, and he did not think it was improper.

¹ Irene made landfall in New York City on August 28, 2011.

Senior disregarded Respondent's orders to stop yelling at Vygon and to stop in front of the desk. Respondent addressed Senior in a loud tone of voice two or three times before she reached the stairwell. After she entered the stairwell, the door behind her closed.

Respondent conceded that he approached the vehicle during the August 30, 2011, car stop. While two police officers conducting a car stop together both should make Activity Log entries, such an entry would not be necessary for a patrol supervisor.

Respondent asserted that he did not recall how he obtained the Person A '61.' In addition to the complaint report, he obtained a domestic incident report and perhaps the Sprint report for the job. He gathered these documents on Department time, but he saw this as furthering the Department's mission. He was reporting an allegation of corruption, in that "they're improperly classifying crime statistics." Respondent did not inform the detective who was assigned to Person A's case that he was communicating with her.

Respondent warned QAD and multiple people he spoke to within the Department that he would go to the media if the downgrading investigation continued to be stonewalled. "I consider myself a whistleblower, that's why I went public with it." He continued, "I went up the chain of command, I called Internal Affairs several times, I asked to speak to supervisors, I asked to speak to Chief Campisi, I called the DA's Office, the U.S. Attorney's Office. I called everybody imaginable to have the corruption addressed and when I couldn't get it addressed, I went to the media." When he provided the complaint reports to the media, he asked that they not publish any of the complainants' names.

Respondent conceded that a supervisor was permitted to look at a subordinate's Activity Log at any time. In Respondent's 20 years as a member of the service, however, his supervisors never scrutinized his Activity Log and other paperwork until after he contacted QAD and IAB.

On re-direct examination, Respondent testified that he rubbed the back of Zeoli's neck after she told him that her neck hurt. When he told her that he was going to stop the massage, she asked him to continue because it was alleviating the pain. He and Zeoli had a friendly relationship.

On re-cross examination, Respondent admitted that Zeoli never specifically asked him to rub her neck.

Upon questioning by the Court, Respondent testified that it was unusual for Olexa to summon QSIU rather than handle the matter at the command level. Respondent believed that Olexa's choice to notify Inspections was based on animus toward him. Two weeks earlier, an officer in the precinct was suspended for yelling at the desk officer without QSIU getting involved.

Respondent first spoke with the disclosing newspaper in November 2011 and the TV station in early 2012.

FINDINGS AND ANALYSIS

Introduction

Respondent was an almost 20-year member of the Department. He had been a sergeant for around 10 of those years and held various positions at the 100 Precinct. He testified that for some time he had witnessed the downgrading of crime classifications. Robberies were classified as lost property, burglaries as criminal mischief, and so forth, so that the 100 Precinct's crime statistics looked better than they actually were.

At one point in 2011, the proverbial straw that broke the camel's back came for Respondent. Around May 2011, he asserted to IAB that he saw his then-commanding officer,

Barrett, downgrade a crime report in a way that involved corruption. A private tow pound had towed a private vehicle belonging to a New York City firefighter. The firefighter broke into the pound and “retrieved” his car, without permission of the pound. The incident originally was classified as a felony burglary but was changed to grand larceny auto, also a felony but of a lesser class than burglary. Both were index crimes, the “seven major” crimes whose reported statistics are a benchmark in the Department for performance. But, Respondent testified, the larceny charge later had to be dropped because a titleholder cannot commit larceny of his own property. The complaint report was closed. Respondent alleged that Barrett arranged the whole thing, telling the pound owner that the firefighter would “make things right” by paying him for his troubles. This was done as a favor to the FDNY. The connection was that Barrett was good friends with an FDNY battalion chief.

Respondent’s allegations were referred to the Quality Assurance Division. He worked with them for the next several months and brought them 11 complaint reports that he believed were downgraded improperly. Respondent alleged that his superiors in the 100 Precinct retaliated against him for reporting their misconduct. For example, he was moved to the midnight tour after years of working the second and third platoons. He also claimed that the putatively unrelated specifications in Case No. 2012-6660, involving a July 2011 incident, were brought in retaliation.

On July 13, 2011, at approximately 0800 hours, Respondent was finishing his tour as patrol supervisor and was in the desk area of the 100 Precinct. Police Officer Dina Zeoli was working as the telephone switchboard operator. She had suffered an automobile accident in which she had injured her neck. On the day in question, she expressed that she was having pain in her neck. Respondent offered to massage her neck for her. He did so at the TS desk,

massaging only her neck and for the sole purpose of alleviating pain. Zeoli testified that she wanted Respondent to give her the massage and did not see it as sexual or inappropriate.

At that moment, two other officers' paths collided, quite literally. One, Police Officer Aleksander Vygon, was leaving the station house at the end of his tour. The other, Police Officer Shawline Senior, was entering for the beginning of hers. She was not assigned to the 100 Precinct but to the Juvenile Robbery Intervention Program, housed in the same building. She had worked there for some time and knew several of the 100 Precinct personnel, including Respondent and Zeoli. But she did not know Vygon because he only was there for the summer beach detail (the 100 Precinct includes most of the Rockaway peninsula).

It was undisputed that Senior was present with two 11-year-old sons, who were with her, she testified, because their camp program began later in the day and the bus was picking them up from the station house. Apparently Vygon did not see Senior and her children and either bumped into them or let go of the door and it hit them. It was undisputed that this outraged Senior, who began yelling at Vygon and walking upstairs to her office. Respondent called out to her and explained that Vygon, just a rookie, did not know who she was and should be cut a little slack. It was undisputed that Senior ignored Respondent and kept walking. Respondent followed her upstairs, demanding that she speak to him. It was undisputed that she again ignored him, protesting that she needed to sign in. It was here that Respondent made the as-charged remark.

When Senior did not comply, Respondent went to the administrative lieutenant and demanded that Senior be suspended for disobedience and courtesy. The new CO, Olexa, was consulted and the Patrol Borough Queens South Investigations Unit was summoned to do the investigation. Respondent asserted that this itself was retaliatory, or at the very least singled him

out for disparate treatment, because officers similarly situated to Senior had been suspended on the spot. Moreover, Respondent complained, Olexa was the former CO of QSIU. It was during the QSIU interviews that Senior mentioned the massage.

The investigation into the Senior-Zeoli matter apparently was joined with another investigation into an April 2011 incident between Respondent and the FDNY. The FDNY's chief of personnel had responded to a joint NYPD-FDNY incident. The chief had been off duty and brought his son to the scene with him. The child was 11 years old but small for his age. Respondent apparently thought that he was much younger than his actual age and this led to some kind of confrontation. According to the QSIU investigator, Mosiurchak, that chief spoke to a battalion chief "from the Rockaways," who told Mosiurchak about an August 30, 2011, traffic summons that Respondent's driver issued to a firefighter during the aftermath of Hurricane/Tropical Storm Irene. Upon a review of Respondent's Activity Log, Mosiurchak found that he made no entry concerning this summons.

Case No. 2012-6660

Specification No. 1

The first specification charges Respondent, a sergeant, with courtesy toward Senior, a police officer, for telling her, in sum and substance, "Get your ass into the hallway." It is true that Department members are expected to be courteous and respectful to others. But it is also true, and more pertinent, that we are a paramilitary organization and the demands of such an organization mean that supervisors sometimes must speak harshly toward subordinates. Our cases are replete with not-guilty findings or dismissals of charges where on-duty officers used profanity toward citizens during tense and volatile situations. See, e.g., Case No. 78667/03, p. 2

(Nov. 3, 2004) (where officer was conducting crowd control in aftermath of West Indian Day Parade shooting and told crowd to “Get the fuck back,” tribunal agreed that “while the Department does not condone the use of profanity by members of the Department when addressing the public, there are recognized instances where its use is not considered to be actionable misconduct.”).

Here, Senior had brought her likely-unauthorized children with her to the command. She engaged in a verbal altercation in the desk area with someone who turned out to be an officer but who, for all she knew, could have been a member of the public. She continuously disobeyed Respondent’s directives to return and speak with him. The fact that she technically was assigned to a different command within the 100 Precinct station house and Respondent was not her “direct supervisor” is irrelevant. Non-direct supervisors like duty captains, Medical Division personnel and misconduct investigators are entitled to give directives to Department members. Disobedience to those directives is a potential disciplinary offense. Moreover, Senior’s replies to Respondent were rude and noncompliant.

Let us put aside the fact that for all of her apparent misconduct, Senior’s sole punishment was a CD, not for courtesy or disobedience, but for tardiness. Respondent was taking valid supervisory action. In the absence of any evidence that Respondent’s words involved racial, ethnic or sexual discrimination, his use of a barely profane word to direct a subordinate to respond to his inquiry was not discourteous. Therefore Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

The second specification relates to Respondent's massage of Zeoli's neck. He admitted this, but said that there was no sexual intent, Zeoli did not see it as sexual, and so it was not inappropriate. The Court disagrees. It is inappropriate for a superior to give a subordinate a neck massage, in public view and in uniform. This is true whether there was overt sexual intent, an underlying sexual context, or no sexual context at all. *Cf. Case No. 85589/09* (Mar. 29, 2012) (inappropriate for off-duty lieutenant to drunkenly share a urinal with complainant officer at a bar in ostensible attempt to teach him about not getting frazzled during street encounters); *Case No. 74298/99* (Jan. 3, 2000) (inappropriate for male supervisor to conduct surprise holster inspection of female subordinate by coming up behind her and grabbing the holster).

Retaliation for Whistleblowing

Retaliation against members of the Department for whistleblowing – providing information to the Internal Affairs Bureau about misconduct by other members – is prohibited by several applicable laws and procedures. See Patrol Guide § 205-38, Scope; Administrative Code 12-113 (b)(1); Civil Service Law § 75-b (2)(a). When retaliation is raised as a defense to disciplinary charges, this tribunal by law must consider it. Matter of Kowaleski v. New York State Dept. of Corr. Servs., 16 N.Y.3d 85, 91 (2010). As the Court understands Respondent's claims, he is asserting that the Department is retaliating against him with the instant disciplinary charges for reporting the downgrading of crimes in the 100 Precinct.

Respondent pointed out that Olexa, the commanding officer of the 100 Precinct about whom he complained, previously was the CO of QSIU. According to Respondent, Olexa

directed that Respondent, who initiated the charges against Senior, be made a subject of the investigation

As commanding officer of the 100 Precinct, Olexa had the right, if not a responsibility, to refer the matter to QSIU. There is no evidence that he was aware of Respondent's complaint. Cf. Phelps v. Cortland County, 271 A.D.2d 909, 910 (3d Dept. 2000). Nor was there any evidence of when, relative to the QSIU investigation, Olexa could have found out about the complaint, so no causal connection between Olexa's knowledge and the supposed retaliatory act could be demonstrated in that manner. Cf. Oberson v. City of N.Y., 232 A.D.2d 172 (1st Dept. 1996) (lack of temporal coincidence demonstrated that no retaliatory purpose was involved). Finally, there is no evidence that Olexa directed QSIU to initiate an investigation of Respondent. There is no evidence that Olexa knew, when he contacted QSIU, that Respondent had been massaging Zeoli just prior to the Senior-Vygon collision.

In any event, the retaliation defense is only available where the disciplinary proceeding is based solely on retaliation. It is a but-for test, meaning that the employee must show the discipline would not have occurred but for the retaliation. See Matter of Plante v. Buono, 172 A.D.2d 81, 85-86 (3d Dept. 1991). If the disciplinary action would have been taken regardless of any whistleblowing, the defense fails. See CSL § 75-b (4); Matter of Coombs v. Village of Canaseraga, 247 A.D.2d 895, 896 (4th Dept. 1998); Matter of Crossman-Battisti v. Traficanti, 235 A.D.2d 566, 568 (3d Dept. 1997). The employer may demonstrate a separate and independent basis for the discipline. See Crossman-Battisti, 235 A.D.2d at 568; Matter of Colao v. Village of Ellenville, 223 A.D.2d 792, 793-94 (3d Dept. 1996). This means, essentially, that the employer would have disciplined the employee regardless of the whistleblowing. Cf. Colao,

223 A.D.2d at 793-94 (inter alia, a “blatantly racist act” by the employee in question would have justified termination on its own).

Here, Senior, the original subject, would have been officially interviewed whether the investigation was led by QSIU or not. There is no sign that she would not have brought up the message if she had been interviewed by 100 Precinct supervisors rather than QSIU. The matter would have become known either way. As the Departmental disciplinary cases cited above demonstrate, misconduct involving inappropriate physical contact between supervisors and subordinates is punished routinely in this tribunal. Because there was ample basis to discipline Respondent for this infraction, a basis for the discipline separate and independent from any retaliatory motive existed. Cf. Roens v. New York City Tr. Auth., 202 A.D.2d 274, 275 (1st Dept. 1994). Respondent’s retaliation defense is rejected accordingly and he is found Guilty of Specification No. 2.

Specification No. 3

As noted, it came to the attention of investigators that Respondent’s driver issued a summons to a firefighter, but Respondent did not put the event down in his Activity Log.

The cases involving sergeants’ Activity Logs mostly involve negotiated pleas and are non-precedential in terms of what the Patrol Guide requires. Moreover, the cases all arise in the context of more serious misconduct situations. The charge of missing Activity Log entries is added for good measure. See, e.g., Case No. 2010-1346 (Sept. 6, 2011) (where sergeant was not allowed into after-hours club to do business inspection, he had his subordinate call 911 to report a “smoke condition” that apparently was at most people smoking cigarettes inside); Case No. 2009-0670 (July 11, 2011) (sergeant and driver used unregistered confidential informant and

failed to arrest him for a possibly stolen motorcycle). This is the case even in matters where the omitted entries concern tasks that specifically a supervisor must perform. See, e.g., Case No. 2010-0356 (Dec. 5, 2011) (patrol supervisor on night of alleged rape of complainant by two on-duty officers failed to memorialize inspection of subordinates).

Here, there is no claim by the Department that the summons was issued inappropriately, even though there was an intimation that Respondent had a problem with the FDNY. That apparently was unsubstantiated at most. The Activity Log charge stands alone, divorced from any other misconduct. Thus, unlike inappropriate physical contact between a sergeant and police officer, it cannot be said that the mere failure to make this kind of Activity Log entry is a charge routinely subject to formal discipline on its own.

Moreover, there was a connection between Respondent's complaints and this specification. According to Respondent, it was an FDNY battalion chief, in collusion with Barrett, that arranged the payoff to the pound owner. Barrett and the BC were good friends. When Mosiurchak went to investigate the apparently separate complaint about Respondent's fire-scene argument with the FDNY chief of personnel, that chief referred the investigator to a BC "from the Rockaways." That BC told Mosiurchak about the summons. The evidence suggests that the BC that alerted investigators to the summons was the same BC that arranged for the complained-of tow pound burglary to be downgraded and eventually ~~dismissed~~. Thus, it cannot be said that the summons specification is a "separate and independent" disciplinary charge from Respondent's corruption complaint. Again, it was undisputed that the summons itself was issued properly.

In sum, this specification, which is minor and technical, would not have been brought but for Respondent's complaint. Accordingly, Respondent is found Not Guilty of Specification No. 3.

Case No. 2012-7865

Specification No. 1

One of the complaint reports about which Respondent complained to IAB and QAD concerned a complaint by Person A. Person A alleged that her boyfriend entered her apartment and damaged property. The actual complaint report classified the incident as only misdemeanor criminal mischief, ostensibly because the suspect had keys to the apartment. According to Respondent, however, officers involved in the original response to the complaint told him that property was taken. Thus, according to Respondent, the incident should have been charged as felony burglary.

The QAD investigator, Napolitano, told Respondent that QAD needed more information concerning the Person A matter. Respondent told Napolitano that he would contact Person A. Napolitano advised against this but could not order Respondent not to do so, as they were of equal rank. Respondent called Person A on the phone and elicited several facts from her that supported a burglary charge, including that her boyfriend took the keys without permission and removed two television sets from the home.

This all apparently was before the 100 Precinct Detective Squad interviewed Person A. When they did so, she told them that an officer named Borrelli from the 100 Precinct had just contacted her. She allegedly told squad personnel that Borrelli had contacted her many times

and she was upset that the incident was being aired so widely. Her boyfriend was arrested but she declined to prosecute.

The Department alleged that Person A declined to prosecute because she was fed up with the contact from Respondent. There is little to support that theory. Mosiurchak made this claim, but also stated that he never spoke to Person A, so it is unclear how he came to that conclusion. It is based at best on multiple layers of hearsay, including the PDS detective and Person A. In any event, Person A did not sound upset when Respondent spoke to her (see RX G, recording of call). She indicated in an email to the detective that she was satisfied with her boyfriend's return of the property or payment of restitution. Finally, she told a domestic violence officer in a follow-up interview that she was fine and that her boyfriend had not contacted her further (see RX C, DD-5 dated Dec. 2, 2011).

That is not the end of the inquiry, however. As a general rule, it is inappropriate for officers to run investigations on matters to which they are not duly assigned. This is true regardless of whether the officer's motives colorably can be described as being for law enforcement purposes. Cf, *Case No. 79421/03*, p. 12 (Oct. 18, 2004) (noting "recklessness" and "poor judgment" of officer's self-initiated test of Police Headquarters security, which he later described online); *Case No. 72049/97 et al.* (Feb. 18, 1998) (officer conducted "investigation" into whether Williamsburg Hasidic community was receiving special treatment). Any further investigation of the Person A matter was for QAD and the 100 PDS to pursue, not Respondent. His role was limited to bringing QAD information from '61's. It was for QAD to investigate those reports to see if they were classified correctly.

Respondent argued that he could not have interfered with the 100 PDS investigation because he spoke to Person A before they did. That makes no sense. The timing of

Respondent's conversation with Person A has no bearing on whether he meddled in someone else's investigation.

Respondent also contended that he did nothing that prevented the 100 PDS from investigating the matter. The Department, however, correctly pointed out that Respondent was not charged with impeding the investigation. Impede means to block or trip up, literally to entangle someone's feet, and this tribunal has held consistently that when the Department charges impeding an investigation, a phrase that does not appear in the Patrol Guide, they must prove the accused officer's actions led investigators to take other steps they would not otherwise have had to take. See, e.g., Case No. 2010-0218 et al., pp. 40-41 (Mar. 26, 2012) (officer's incomplete and inaccurate answers at official interview did not lead investigator to take any more steps that he otherwise would not have taken, like interviewing other witnesses). Impeding was not charged here and it was unnecessary for the Department to prove it. It was sufficient to show that Respondent took investigatory steps on a matter to which he was not assigned so that he could uncover information germane to his crime-downgrading investigation.

Finally, this specification is not retaliatory because it is rational and expected that the Department would bring charges where a member interferes with an investigation in this way. See 72049/97 et al., p. 23 ("If every member of []this service were allowed to desert his post and ignore his assigned duties in order to pursue a matter that was of interest to him . . . the Department would cease to function as an effective paramilitary organization." Thus, the charge is separate and independent from Respondent's whistleblowing.

As such, Respondent is found Guilty of Specification No. 1.

Specification No. 2

The second specification charges Respondent with releasing unredacted '61's to the news media. Respondent admitted doing so and testified that he went to the press out of frustration that his complaints were not getting anywhere. There is no real dispute that it was improper for Respondent to release Department documents in this manner and that he would have faced disciplinary charges whether he had gone to IAB or not. Moreover, going to the media is not protected by the whistleblowing statutes because those statutes relate only to reports of misconduct to a government agency. Therefore, Respondent is found Guilty of Specification No. 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on August 30, 1993. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum. Respondent also moved into evidence (RX J) his annual performance evaluations for 2008, 2009 and 2010. He received an overall rating of 4.5 "Extremely Competent/Highly Competent" in 2008 and 2009, and 4.0 "Highly Competent" in 2010.

Respondent has been found Guilty of several improper actions during the course of a duly-initiated IAB/QAD investigation into the improper downgrading of crimes by his precinct. Respondent himself brought to the attention of investigators 11 or 12 complaint reports that had been classified at less-severe levels of crime than Respondent thought appropriate. Respondent, on his own, contacted the complainant on one of these cases to get more information directly

from her. Respondent also contacted the news media and gave them unredacted copies of eight '61's in an attempt to call attention to his complaints.

Separately, Respondent also has been found Guilty of giving a neck massage to a subordinate female officer, while on duty, in uniform, and in public view.

Respondent's release of unredacted victim information to the press was serious misconduct. He had only an assurance from the reporter that the complainants' names and personal details would not be published. Yet there are myriad ways in which that information, which included names, addresses, telephone numbers and the like, could have been misused.

It is true that Respondent believed complaint reports were being downgraded for purposes that at best would lead to artificially reduced crime numbers and at worst were outright corrupt. But he is not the sole arbiter of whether that was the case. As the QAD investigator detailed, some of the reclassifications were deemed to have resulted from misunderstandings. For example, Person A told QAD that she had, at times, given her boyfriend a key and that he had permission to be in the apartment, but they had broken up at the time of the burglary. So, according to QAD, while the crime should have been classified as a burglary, the first responding officers innocently might have misinterpreted what Person A was telling them. Respondent was not entitled to give documents to the press because his view of the misclassifications was not being accepted by QAD, IAB or prosecutors. His claims are not proof.

The closest precedent addressing similar misconduct arises out of a matter concerning a leak of police officer applicant paperwork to the media. Police officers who worked at the Applicant Processing Division (APD) were unhappy with the quality of applicants that were being approved. Some had arrest records for theft or weapons possession, for example. Two

APD officers gave their delegate copies of selected applications, ostensibly so that the delegate could approach the commanding officer about the problem. Instead, the delegate gave the paperwork to the union's spokesperson, who leaked them to a newspaper. This all was an attempt, allegedly, to influence the ongoing contract negotiations between the City and the union. If the public knew that underqualified individuals were being accepted as recruits, there might be a push for a higher starting salary to attract those with better qualifications.

The delegate, who had one prior disciplinary offense, pleaded Guilty and received a penalty of 90 suspension days (including 30 already served) and placement on one year of dismissal probation. See Case No. 82092/06 (Mar. 9, 2007). The two officers went to trial and were found Not Guilty, but on the basis that their conduct did not violate the City Charter. They did not leak the information to advance a "private interest," as that term is meant within the meaning of the Charter. They were found Guilty of failing to report the delegate's misconduct and received a penalty of the forfeiture of 30 vacation days each. See Case Nos. 82093 & -95/06 (Sept. 29, 2008).

In light of the delegate's prior record, the fact that it was a plea, and the fact that he was near retirement and simply might have wanted to get the matter over with, the higher penalty cannot be viewed as precedential. Moreover, in another case, albeit also a plea, a veteran member with no record assigned as the watch commander at the Office of Emergency Management received emergency information regarding the Indian Point nuclear plant. He disclosed the information to a news outlet and forfeited 20 vacation days as a penalty. See Case No. 76227/00 (Mar. 9, 2001).

Respondent alleged that after he complained to IAB about downgrading, he was transferred to the midnight tour, and then to the Bronx Court Section. Respondent argued that

this was retaliation by his supervisors for his complaints. These were not themselves disciplinary charges against Respondent, however, so the whistleblower defense under CSL § 75-b is not directly applicable. Nevertheless, it is appropriate to consider the claims in the context of penalty, especially in light of the Patrol Guide's very strong admonition against retaliation for reporting misconduct.²

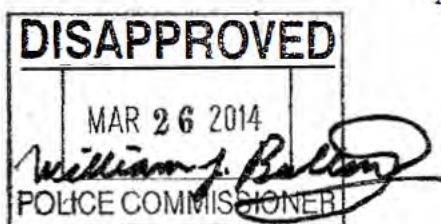
The Advocate did not refute or even respond to Respondent's arguments. Respondent testified that his transfer to BXCS was "for cause" and his Central Personnel Index (of which the Court has taken judicial notice) has notations that are consistent, but no further useful information is provided. This merits consideration in the assessment of a penalty recommendation.

As such, the Court recommends that Respondent forfeit 45 vacation days as a penalty for his misconduct in this case.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials



² See Patrol Guide § 205-38, Scope ("IT IS THE POLICY OF THIS DEPARTMENT THAT RETALIATION AGAINST ANY MEMBER OF THE SERVICE FOR VOLUNTARILY PROVIDING INFORMATION REGARDING MISCONDUCT AND CORRUPTION WILL NOT BE TOLERATED").

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT ROBERT BORRELLI
TAX REGISTRY NO. 903466
DISCIPLINARY CASE NOS. 2012-6660 & 2012-7865

In 2012, Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2010 and 2.5 "Competent/Low" in 2011. He was awarded one medal for Meritorious Police Duty. [REDACTED]

[REDACTED]
He has been on Level II Discipline Monitoring since May 2012.

Respondent has been the subject of two prior adjudications. In 2007, he forfeited 10 vacation days after pleading guilty to failing to safeguard his firearm in the cell area of the precinct after having gone there to visit his friend, who had been arrested [REDACTED]
[REDACTED]
[REDACTED]

For your consideration,



David S. Weisel
Assistant Deputy Commissioner Trials